IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.499 of 2005
Date of decision:7.11.2006

Shri Som Nath Maini

...Appellant

versus

The Commissioner of Income tax III, Rishi Nagar, Ludhiana

....Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Sanjay Bansal, Advocate, for the appellant.

JUDGMENT:

The assessee has preferred this appeal against the order dated 11.8.2005 passed by the Income Tax Appellate Tribunal, Chandigarh Bench A, Chandigarh in ITA No.829/chandi/2002, for the assessment year 1998-99, proposing following substantial questions of law:-

"i) Whether the Tribunal misdirected itself in law as well as on facts in reversing the order passed by the learned CIT (A) by recording its conclusion based on surmises and conjectures and in ignoring uncontroverted material on record?

ii) Whether, on the facts and in the circumstances of the case, it was open to the Tribunal to reverse the order of the CIT (A) without adverting to the reasons assigned by the latter with reference to uncontroverted material on record so as to reflect the application of mind by the Tribunal?

Iii) Whether on a harmonious construction of the provisions of Section 68 of the Income tax Act, 1961 and Section 106 of the Evidence Act, was the Tribunal on the material on record, legally correct in reversing the order passed by the CIT(A), when the appellant-assessee had discharged

his burden of proving the transaction of sale and purchase of shares to be genuine?

iv) Whether the impugned order passed by the Tribunal reversing the perfectly legal and valid order passed by the CIT(A), is perverse and result of failure to act judicially and non application of mind?

The assessee incurred capital loss on account of sale of gold jewellery and also had short term capital gain of almost equal amount. The Assessing Officer observed that short term gain was not genuine in as much as the assessee had purchased 45000 shares of M/s Ankur International Limited at a varying rates from Rs.2.06 to Rs.3.1 per share and sold them within a short span of six-seven months at the rate varying from Rs.47.75 paise to Rs.55/-. These shares were purchased through a broker Munish Arora & Co. and sold through another broker M/s SK Sharma & Co. The AO took by surprise the astronomical rise in share price of a company from Rs.3/- to Rs.55/- and started further enquiry.

The assessing officer after enquiry made addition to the income of the assessee, which was upheld by the CIT(A) as well as by the Tribunal.

Learned counsel for the assessee submitted that the view taken by the Tribunal is perverse. The assessee having discharged the burden of proving the transactions of sale and purchase of the shares to be genuine, burden of proving that the said transactions were not genuine, was on the department and in absence of any material on record, holding the transactions to be not genuine, was not permissible.

We are unable to accept the submission made. Burden of proving that Income is subject to tax is on the revenue but on facts, to show that the transaction is genuine, burden is primarily on the assessee. The Assessing Officer is to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of evidence that the transaction was genuine, cannot be conclusive. Such evidence is required to be assessed by the Assessing Officer in a reasonable way. Genuineness of the transaction can be rejected even if the assessee leads evidence which is not trust-worthy, even if the department does not lead any evidence on such an issue.

In view of the above, we are of the view that the finding

recorded by the Tribunal is a finding of fact and cannot be held to be perverse.

No substantial question of law arises.

The appeal is dismissed.

(Adarsh Kumar Goel)
Judge

November 7, 2006
'gs'

(Rajesh Bindal)
Judge